NO. 90-1455
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Supreme Court, U.S.
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CITY OF BRIDGE CITY, TEXAS
Petitioner

VS.

STATE OF TEXAS, EX REL.
CITY OF PORT ARTHUR, TEXAS, ET AL,
Respondents

OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Because this case was heard in the state courts, 28 U.S.C. Section 1254 does not invoke this Court's jurisdiction.

II. The City of Bridge City failed to raise in the lower courts the federal questions which form the basis of its petition for writ of certiorari.

III. Writ of Certiorari should be denied because a political subdivision of the State cannot invoke the protection of the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.

IV. The method of applying a state statute allowing attorneys fees is strictly a matter of interpretation for the state courts and cannot be said to violate the Fourteenth Amendment.

V. The Eighth Amendment does not apply to attorneys fees granted in a civil suit where a municipal corporation is acting as an ordinary litigant.

VI. The award of attorneys fees pursuant to well established rules does not violate the Eighth Amendment.

LIST OF PARTIES

The parties to the proceedings below were:

Petitioner: The City of Bridge City, Texas;

Respondents: The State of Texas, ex rel. City of Port Arthur and the City of Port Arthur as Declaratory Judgment Plaintiff and Appellee in the state courts.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
STATUTES INVOLVED	vii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	
I. Because this case was heard in the state courts, 28 U.S.C. Section 1254 does not invoke this Court's jurisdiction. . . .	2
II. The City of Bridge City failed to raise in the lower courts the federal questions which form the basis of its petition for writ of certiorari	3
III. Writ of Certiorari should be denied because a political subdivision of the State cannot invoke the protection of the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution	6

IV. The method of applying a state statute allowing attorneys fees is strictly a matter of interpretation for the state courts and cannot be said to violate the Fourteenth Amendment . . 7

V. The Eighth Amendment does not apply to attorneys fees granted in a civil suit where a municipal corporation is acting as an ordinary litigant . . . 9

VI. The award of attorneys fees pursuant to well established rules does not violate the Eighth Amendment 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

	PAGE
Alexander Milburn Co. v. Davis Bournonville Co., 270 U.S. 390, 46 S.Ct. 324, 70 L.Ed. 651 (1926) . . .	6
Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909, 2914, n. 3,106 L.Ed.2d 219.	9, 10
City of Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923).	6
Hartford Life Insurance Company v. Blinco, Administratrix of Barber, 255 U.S. 129, 138, 41 S.Ct. 276, 65 L.Ed. 549 (1921).	7, 8
Pacific Mutual Life Insurance Company v. Haslip, 111 S. Ct. 1032 (1991) other 5, 6 publications not available	3, 11, 12
Prune Yard Shopping Center v. Robins, 447 U.S. 74, 85, n.9; 100 S.Ct. 2035, 2043, n.9; 64 L.Ed.2d 741 (1980)	4

Reynolds v. McCullough,
739 S.W. 2d 424
(Tex. App.--San Antonio
1987, writ denied). 11

South Macomb Disposal
v. Township of Washington,
790 F2d 500, 504-505
(6th Cir. 1986) 6

Street v. New York,
394 U.S. 576, 582, 89 S. Ct.
1354, 1360, 22 L. Ed.
2d 572 (1969) 5

Tacon v. Arizona,
410 U.S. 351;
93 S.Ct. 998;
35 L.Ed.2d 346. 4

Webb v. Webb,
451 U.S. 493, 495;
101 S. Ct. 1889,
1891; 68 L.Ed.2d
392 (1981). 4, 5

Williams v. Mayor
& City Council
of Baltimore, 289 U.S. 36,
40, 53 S.Ct. 431, 432,
77 l.Ed. 1015 (1933). 6

STATUTES

28 U.S.C. Section 1254. 3
28 U.S.C. Section 1257. 3
Tex. Civ. Prac. & Rem. Code Ann.,
Section 37.009 (West 1986). . 10

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The respondents State of Texas, ex. rel. City of Port Arthur and the City of

Port Arthur, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Texas Supreme Court's decision denying writ of error in this case on October 31, 1990.

STATEMENT OF THE CASE

Petitioner is not a resident of Orange County (Petition for Writ of Certiorari, p. 2) but rather is a municipal corporation formed under the laws of the State of Texas and which is domiciled in Orange County, Texas.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Writ of certiorari should be denied because Petitioner incorrectly states that jurisdiction lies under 28 U.S.C. Section 1254.

Petitioner is applying for a writ of

certiorari to the Texas Supreme Court on a case heard in the Texas courts, therefore, there is no jurisdiction under 28 U.S.C. Section 1254.

2. Because Petitioner raised no federal question in the State courts, there is no jurisdiction.

The City of Bridge City failed to raise the federal questions presented here before the "court of first instance" and the appellate courts. Under 28 U.S.C. Section 1257, the petitioner is required to have set out and claimed the right under the Constitution which it is seeking to enforce. Pacific Mutual Life Insurance Company v. Haslip, 111 S.Ct. 1032 (1991) other publications not

available; Webb v. Webb, 451 U.S. 493, 495; 101 S.Ct. 1889, 1891; 68 L.Ed.2d 392 (1981); see also Prune Yard Shopping Center v. Robins, 447 U.S. 74, 85, n.9; 100 S. Ct. 2035, 2043, n.9; 64 L.Ed.2d 741 (1980); Tacon v. Arizona, 410 U.S. 351; 93 S.Ct. 998; 35 L.Ed.2d 346. By failing to present to the state courts the constitutional issues raised here, Petitioner has failed to meet the jurisdictional requirements of 28 U.S.C. Section 1257. Webb, supra.

The City of Bridge City, as petitioner for writ of certiorari, must show that the federal question was raised, the manner in which it was raised and the decision of the state court on the federal question. The opinions of

the state courts appended to the Petition for Writ of Certiorari do not mention any federal question. Where the federal issues are not mentioned in the opinions of the state courts, this Court assumes that the "omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Webb, supra; citing Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22L.Ed.2d 572 (1969). In this case, Petitioner completely failed to raise the federal issues and cannot show proper presentation or a decision of the state courts on those issues.

3. A political subdivision of the State cannot invoke the protection of the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the Constitution.

Because of its nature as a creation of the state, a municipality may not invoke the protection of the Fourteenth Amendment against the action of the state. Williams v. Mayor & City Council of Baltimore, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 l.Ed. 1015 (1933); Alexander Milburn Co. v. Davis Bournonville Co., 270 U.S. 390, 46 S.Ct. 324, 70 L.Ed. 651 (1926); City of Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); South Macomb Disposal v. Township of Washington, 790 F2d 500, 504-505 (6th Cir. 1986).

4. The method of applying a state statute allowing attorneys fees is strictly a matter of interpretation for the state courts and cannot be said to violate the Fourteenth Amendment.

The Texas Ninth Court of Appeals determined that the trial court had correctly calculated and awarded attorneys fees. See Appendix D to Petition for Writ of Certiorari. The Texas Supreme Court denied Petitioner's application for writ of error. See Appendix B to Petition for Writ of Certiorari. This Court has held that the method of applying a state statute allowing attorneys fees is strictly a matter of interpretation for the state courts. Hartford Life Insurance Company

v. Blinco, Administratrix of Barber, 255 U.S. 129, 138, 41 S.Ct. 276, 65 L.Ed. 549 (1921). In Blinco, the petitioner claimed that the state court had improperly awarded attorneys fees to the opposing party when petitioner had prevailed on every issue thus depriving petitioner of its property without due process of law. This Court held that they would not review the decision of the state court construing a state statute and that such construction was not a violation of the Fourteenth Amendment. Id. Bridge City's claim regarding attorneys fees is identical to that in Blinco except that Bridge City lost on every issue. The trial court properly applied Texas rules for awarding

attorneys fees and such application cannot be said to violate either the Fourteenth Amendment or the Eighth Amendment.

5. The Eighth Amendment does not apply to attorneys fees granted in a civil suit where a municipal corporation is acting as an ordinary litigant.

The City of Port Arthur did not recover attorneys fees as the state government recovering a fine from a criminal or civil litigant. The City of Port Arthur as an ordinary civil litigant has not imposed some governmental action which would restrain the civil liberties of another or lead to some sort of governmental overreaching. Browning-

Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,492 U.S. 257, 109 S.Ct. 2909, 2914, n. 3,106 L.Ed.2d 219. Rather, Port Arthur recovered attorneys fees under the Texas Declaratory Judgment Act which provides:

> In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.

Tex. Civ. Prac. & Rem. Code Ann., Section 37.009 (West 1986). As such, Port Arthur committed no action which would bring it under the purview of the Eighth Amendment. Browning-Ferris, supra.

6. The award of attorneys fees pursuant to well established rules does not violate the Eighth Amendment.

The trial court awarded attorneys fees based on statutory and case law and not on unlimited judicial discretion. Haslip, supra. For the method of awarding attorneys fees see Reynolds v. McCullough, 739 S.W. 2d 424 (Tex. App.-- San Antonio 1987, writ denied). The Texas Ninth Court of Appeals found that the City of Port Arthur was entitled to recover attorneys fees under the Texas Civil Practice and Remedies Code, Sections 37.001 - 37.011. Additionally the Court of Appeals found that because the quo warranto action and the declaratory action arose out of the same transaction and are so intertwined that they involve the same proof, that segregation of fees incurred in

prosecuting each action was not possible. Because the trial court awarded attorneys fees pursuant to well established rules, and not "unlimited judicial discretion", there is no violation of the Eighth Amendment. Haslip, supra.

CONCLUSION

For the reasons set out above, the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert Q. Keith, a member of the Bar of this Court, hereby certify on the 18th day of April, 1991, a copy of the Opposition to Writ of Certiorari in the above-entitled case was mailed, certified mail, return receipt requested, to each of the following counsel for the Petitioner herein. I further certify that all parties required to be served have been served.

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